

EXHIBIT E

VOLUME: I
PAGES: 1 - 80
EXHIBITS: SEE INDEX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
CASE NO. 04-10006-JGD

MICHAEL RODIO,
plaintiff,

vs.

R.J. REYNOLDS TOBACCO COMPANY,
Defendant.

DEPOSITION OF RICHARD F. KANE, a witness
called on behalf of the Plaintiff, pursuant to the
Federal Rules of Civil Procedure, before Linda A.
Menard, a Registered Professional Reporter and
Notary Public in and for the Commonwealth of
Massachusetts, at Sahady Associates, P.C., 199
North Main Street, Fall River, Massachusetts, on
Tuesday, June 14, 2005, commencing at 1:10 P.M.

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APPEARANCES:

SAHADY ASSOCIATES, P.C.
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For the Plaintiff

CONSTANGY, BROOKS & SMITH, LLC
W.R. Loftis, Jr., Esquire
100 N. Cherry Street, Suite 300
Winston-Salem, NC 27101
For the Defendant

ALSO PRESENT:

Jackson Henson, Esquire

I N D E X

DEPONENT	PAGE
Richard F. Kane	
Examination by Mr. Sahady	4

I N D E X

Exhibit	Description	Page
1	Letter from C. Fasciani to M. Rodio, 10-28-02.....	50
2	List of Prices	75

1 handbook that there were certain things that the
2 company would adhere to as far as advertising
3 codes.

4 Q. What does MSA stand for?

5 A. Master -- I believe Master Settlement
6 Agreement.

7 Q. And that is the agreement reached as a
8 result of the various states suing the tobacco
9 companies?

10 A. That in layman's terms would be my
11 understanding, correct.

12 Q. What were you told or instructed as to the
13 health codes in that regard, of Massachusetts?

14 A. I'd have to clarify again because my
15 understanding is that the health codes of
16 Massachusetts are not necessarily the same as what
17 was in the Master Settlement Agreement. I'm not
18 really sure what you're talking about on health
19 codes.

20 Q. Do you know that there is a Mass. health
21 regulation that prohibits the display of cigarette
22 advertising below a certain level on a counter,
23 below a certain height?

24 A. I'm not aware of any such regulation in

1 the State of Massachusetts from a height
2 perspective.

3 Q. And you supervise sales reps in
4 Massachusetts?

5 A. I supervise managers who supervise sale
6 representatives. They do not report directly to
7 me.

8 Q. We should get to that before I ask you
9 about this. After '81; what did you do for the
10 company?

11 A. I was promoted to a position called
12 assistant division manager in Albany, New York.

13 Q. What were your duties as such?

14 A. To assist the division manager on managing
15 the sales force within the geographic boundaries of
16 the Albany division.

17 Q. So that was strictly in New York?

18 A. Yes.

19 Q. You didn't cover Massachusetts?

20 A. No, I did not.

21 Q. Was New York a fair trade state, do you
22 know, at the time?

23 A. I do not recall that New York was a fair
24 trade state at that time.

1 Q. Do you see that: "You failed to place id
2 maintain the appropriate VAP point-of-sale, POS
3 advertising and back-up discounting cards in the
4 VAP communicator, as instructed by management."
5 What does this mean?

6 A. The sales rep would be responsible for
7 placing point of sale to support a VAP promotion
8 which is a buy-some, get-some-free offer.

9 Q. And where would this be placed?

10 A. As close to the point of purchase as
11 possible.

12 Q. On a counter?

13 A. If possible.

14 Q. The counter is the best place?

15 A. In most stores it is.

16 Q. And regardless of the counter's height?

17 A. What do you mean by "regardless of the
18 counter's height"?

19 Q. Whether the counter is six feet high or
20 three feet high off the ground, it didn't matter,
21 did it?

22 A. It would be in a good visible location,
23 visible to the adult smoker.

24 Q. That wasn't my question. Did the height

1 of the counter matter?

2 A. I don't really understand your question
3 "did the height matter".

4 Q. Did it make a difference to you in making
5 this instruction whether the point-of-sale
6 advertising is going to be on a counter that is six
7 feet high or a counter that was four feet high?

8 A. It would be placed on whatever the counter
9 was in the store.

10 Q. Right, and it didn't matter to you what
11 height that counter was?

12 A. As long as it was not in inches, if that
13 is what your question is.

14 Q. Inches, they'd step on it, right?

15 A. Inches or feet.

16 Q. So did you take into consideration the
17 height of the counter?

18 A. We did not measure the heights of the
19 counters, no.

20 Q. I understand you didn't measure. That
21 wasn't my question, sir. Let's not play games with
22 words because I can play the same game. My
23 question wasn't a measurement. I know you didn't
24 go and measure. Nobody measured. But did you take

1 into account the height of the counter in
2 determining the position of the advertising? It
3 a simple question.

4 A. I still don't understand your question;
5 because when you use the word "height" to me, th
6 denotes a measurement.

7 Q. Yes, it denotes feet. Okay?

8 A. Right.

9 Q. Let me repeat it again. If you don't
10 understand it, don't answer it; ask me to repeat
11 it.

12 If a counter is six feet, would that be
13 okay to place your point-of-sale sign on?

14 A. That in my judgment would be too high. e
15 would want to place it in a good visible location
16 to the adult consumer.

17 Q. How about three and a half, four feet?

18 A. In my judgment, that would be fine.

19 Q. And if the sales rep violates this after
20 warning after warning, it would be grounds for
21 dismissal?

22 A. Violates what?

23 Q. Your rule about placing the point-of-sale
24 advertising at three and a half or four feet?

1 A. I didn't have a rule for three and a half
2 or four feet.

3 Q. But it was perfectly okay to place the
4 advertising three and a half to four feet; six feet
5 was too high. Is that what you said?

6 A. It would be on the normal counter in the
7 store.

8 Q. If that normal counter in this store, Mr.
9 Kane, is three and a half to four feet, that would
10 be visible to everybody, that would be okay with
11 you, would it not?

12 A. That is correct.

13 Q. Okay. Thank you. And do you know in the
14 Cloverdale Farms -- we're on Page 2 of Exhibit 1 --
15 your deposition -- what the height of that
16 point-of-sale counter would have been?

17 A. I would have no idea.

18 Q. And it really didn't matter to you as long
19 as it was above inches and below six feet?

20 A. As long as it was placed on the counter in
21 the store.

22 Q. Regardless of that counter's height as
23 long as it isn't too high?

24 A. As long as it was visible to the consumer

1 question.

2 MR. SAHADY: If he knows.

3 A. I cannot speak to --

4 MR. LOFTIS: I'm just saying I just object
5 to the form of the question to the sense he
6 wouldn't know what someone else's state of mind
7 would be.

8 MR. SAHADY: It's not state of mind. It's
9 the law.

10 Q. So, if a brand of cigarettes is sold below
11 the state minimum, the state is being cheated out
12 of its taxes; is it not?

13 MR. LOFTIS: Again, objection to the form
14 of the question. But you can answer it, if you
15 know.

16 MR. SAHADY: It's evading a lawful tax.

17 Q. Yes or no, Mr. Kane?

18 A. I can't answer that question. I don't --
19 I mean, I don't understand the nature of your
20 question.

21 Q. The nature of my question is, if a
22 cigarette is sold for \$5, there's a five-percent
23 tax on that -- if a pack of cigarettes, rather, and
24 if it sold for \$4, there's a five-percent sales tax

1 on that. So if you sell your cigarettes below the
2 state minimum, which is contrary to the law, you
3 are paying less in taxes in Massachusetts than you
4 should?

5 MR. LOFTIS: When you said "you are
6 selling", who are you talking about?

7 MR. SAHADY: I mean RJR, not Mr. Kane
8 personally.

9 MR. LOFTIS: But again you are implying
10 that RJ Reynolds sells the cigarettes to the
11 consumer.

12 Q. You're saying RJR does not sell to the
13 consumer, all right.

14 Let's see if we can clarify this. Let's
15 turn to Page 8, Mr. Kane. The very last paragraph
16 on Page 8 under Swidey's Variety Store: "You
17 failed to execute the everyday low price, EDLP,
18 contract requirements in this account by not
19 placing signage and failing to maintain the
20 everyday lowest price for Monarch in this account.

21 You are saying to him he has failed to
22 maintain the everyday lowest price for Monarch in
23 this account; is that what that says?

24 A. You read it exactly the way I've read it

1 Q. And this was written by Mr. Fasciani,
2 reviewed by Mr. Deschenes, and the allegations were
3 reviewed by you --

4 A. That is correct.

5 Q. -- prior to the delivery of this letter to
6 Mr. Rodio, right?

7 A. Correct.

8 Q. What did you mean when you said he failed
9 to maintain the everyday lowest price, he failed.
10 were you urging him to sell cigarettes at a certain
11 price or not?

12 A. The everyday low price program when
13 presented to the retailer, which it's the
14 retailer's option to accept or not, states that R
15 Reynolds' brand -- and I have to refer here --
16 which would be Monarch, there can be no brand in
17 the store sold to the consumer for a lower price
18 than Monarch.

19 Q. If it's the decision of the retailer, then
20 why do you put the burden on your sales rep to
21 maintain the lowest price?

22 A. Because the sales rep -- by signing the
23 retailer up on this program, the retailer has to
24 adhere to the requirements of the program; and the

1 sales rep's job is ensure that the retailer adhere s
2 to the contractual requirements that he signed o
3 on.

4 Q. Which is to sell your cigarettes below
5 state minimum?

6 A. There is nothing here in this sentence
7 that you read to me that speaks anything to state
8 minimum.

9 Q. Let's go back and read the rest of this
10 maybe that will help: "Wave, competitive product
11 cigarettes retail for \$3.52 per pack while RJRT's
12 Monarch retail for \$3.62 per pack."

13 A. Okay.

14 Q. You were blaming Rodio and firing him for
15 not selling your Monarch brand at 3.52 or below.
16 Isn't that what this plain English means?

17 A. This is saying that Monarch was not the
18 everyday-low-price brand in the store. The
19 retailer signed up for a program that would require
20 Monarch to be the everyday-low-price brand,
21 regardless of what -- the retailer establishes the
22 price.

23 Q. Regardless of what the state minimum was,
24 yes or no.

1 A. I don't know what the retailer did
2 regarding state minimum. I do not know what the
3 state minimum price was at that time.

4 Q. Shouldn't you have known, Mr. Kane, with
5 all your experience and long standing with this
6 company that the price, minimum price was 4.01 and
7 you are urging this guy to sell it below 3.62?

8 A. No, I would not; because I do not know
9 that the price that you are referring to, 4.01, was
10 in fact the state minimum at the time.

11 Q. You don't think the Attorney General has
12 the state minimums for every year?

13 A. I would assume they would.

14 Q. Did you ever check on that to see what the
15 minimum was in 2002?

16 A. Was it part of my role to check what the
17 state minimum price was with the Attorney General?

18 Q. You were firing Mr. Rodio for failing to
19 sell Monarch below 3.62 when the minimum price set
20 by the state was 4.01. Isn't that what you were
21 doing here in your own words, the words of your
22 company?

23 MR. LOFTIS: Objection to the form of the
24 question.

1 long as the price is established by the retailer
2 Is that what you're saying?

3 A. It is not my role to get involved in a
4 state minimum pricing discussion with a retailer

5 Q. So you're indifferent as to what the state
6 minimum is and you want to sell your cigarettes
7 that lowest price in the store regardless of
8 whether it is within the state minimum or not?

9 A. I can't answer that.

10 Q. Of course. Thank you. I'll be asking you
11 about that in the future. That's it.

12 MR. LOFTIS: Let me take a break. I may
13 or may not have questions.

14 MR. SAHADY: Sure. Whatever you want.

15 (Break.)

16 MR. LOFTIS: We have no questions.

17 (Deposition concluded at 3:05 p.m.)
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